HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1197 Civil Remedies Against Insurers
SPONSOR(S): Civil Justice Subcommittee; Hill; Passidomo and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1088

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	9 Y, 4 N, As CS	Robinson	Bond
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Current law imposes a duty of duty of good faith on the part of an insurer in negotiating the settlement of a claim with the insured or a third-party. The insured or a third-party claimant may bring a civil action against an insurer if such party is damaged by the insurer's "bad faith." An insurer acts in bad faith when it does not attempt in good faith to settle claims and, under the circumstances, it could have had it acted fairly and honestly toward its insured and with due regard to his or her interest.

The bill provides that before bringing an action alleging bad faith, the insured, the claimant, or anyone acting on behalf of either the insured or the claimant (hereinafter, “claimant”) must provide a written notice of loss to the insurer.

If the insurer timely provides a disclosure statement and offers to pay the claimant the lesser of the amount the claimant is willing to accept or the insurance policy’s liability limit within 45 days, in exchange for a full release from liability, then the insurer cannot be found to have acted in bad faith.

This bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Insurance and Insurer Obligations

Insurance is a contract, commonly referred to as a "policy", under which, for stipulated consideration called a "premium", one party, the insurer, undertakes to compensate the other, the insured, for loss on a specified subject from specified perils. Florida residents often obtain two major categories of insurance: property insurance and liability insurance. Property insurance protects individuals from the loss of or damage to property and, also in some instances, personal liability pertaining to the property. One of the common lines of insurance in this category is homeowner's insurance. Automobile liability insurance[1] covers suits against the insured for such damages as injury or death to another driver or passenger as well as property damage. It is insurance for those damages for which the driver can be held liable due to the operation of the automobile.

A liability insurer generally owes two major contractual duties to its insured in exchange for premium payments—the duty to indemnify and the duty to defend.[2] The duty to indemnify refers to the insurer's obligation to issue payment either to the insured or a beneficiary on a valid claim.[3] The duty to defend refers to the insurer's duty to provide a defense for the insured in court against a third party with respect to a claim within the scope of the insurance contract.[4]

Statutory and Common Law Bad Faith

Common Law Bad Faith - "Third Party Claims"

As early as 1938, Florida courts have recognized an additional duty that does not arise directly from the contract, the common law duty of good faith on the part of an insurer to the insured in negotiating settlements with third-party claimants.[5] Under a liability policy, the insured's role is essentially limited to selecting the type and desired level of coverage and paying the corresponding premium.[6] As part of the contract, the insured surrenders to the insurer all control over the negotiations and decision making as to third party claims.[7] The insured's role is relegated to the obligation to cooperate with the insurer's efforts to adjust the loss.[8] The insurer makes all the decisions with regard to third party claims handling and thereby has the power to settle and foreclose an insured's exposure to liability, or to refuse to settle and leave the insured exposed to liability in excess of the policy limits.[9] As a result, "the relationship between the parties arising from the bodily injury liability provisions of the policy is fiduciary in nature, much akin to that of attorney and client," because the insurer owes a duty to refrain from acting solely on the basis of its own interests in the settlement of third party claims.[10] Accordingly, and because of this relationship, the insurer owes a duty to the insured to "exercise the utmost good faith and

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[1] In Florida, every owner or operator of an automobile is required to maintain liability insurance to cover a minimum of $10,000 in coverage for damage to another's property in a crash. Additionally, every owner or registrant of an automobile is required to maintain personal injury protection, which covers medical expenses related to a car accident regardless of fault up to $10,000. ss. 324.022 and 627.733, F.S.
[2] 16 Williston on Contracts s. 49:103 (4th ed.).
[3] *Id.*
[4] *Id.*
[5] *Auto. Mut. Indemnity Co. v. Shaw,* 184 So. 852 (Fla. 1938).
[6] Rutledge R. Liles, *Florida Insurance Bad Faith Law: Protecting Businesses and You*, 85 Fla. Bar. J. No. 3, p. 8 (March 2011).
[7] *Id.*
[8] *Id.*
[9] *State Farm v. Laforet*, 658 So. 2d 55, 58 (Fla. 1995).
[10] *Baxter v. Royal Indem. Co.*, 285 So. 2d 652, 655 (Fla. 1st D.C.A. 1973), *cert. discharged*, 317 So. 2d 725 (Fla. 1975).

reasonable discretion in evaluating the claim" and negotiating for a settlement within the policy limits.[11] When the insurer fails to act in the best interests of the insured in settling a third party claim, an injured insured is entitled to hold the insurer accountable for its "bad faith"[12] if a third-party obtains a judgment against the insured in excess of his or her insurance coverage.[13] A third-party claim can be brought by the insured, having been held liable for judgment in excess of policy limits by the third-party claimant,[14] or it can be brought by the third party either directly or through an assignment of the insured's rights.[15]

Statutory Bad Faith -- First- and Third-Party Claims

In 1982 the Legislature enacted s. 624.155, F.S. which provides that *any person* may bring a claim for "bad faith" against an insurer for "not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured with due regard for her or his interests,"[16] the same as the common law standard.[17] Section 624.155, F.S. codifies third-party claims for "bad faith", but does not preempt the common law remedy.[18] Additionally, s. 624.155, F.S. recognizes a claim for bad faith against an insurer not only in the instance of settlement negotiations with a third party, but also for an insured seeking payment from his or her own insurance company. Although Florida courts recognized a bad faith cause of action in the context of liability policies at common law, they did not impose the same obligation in the context of first-party insurance contracts, when the injured party was also the insured under the insurance policy.[19] At common law, first-party insurance policies were enforced solely through traditional contract remedies.[20]

In a first-party action under s. 624.155, F.S., there is never a fiduciary relationship between the parties, but an arm's length contractual one based on the insurance contract. A first-party claim against the insurer does not accrue until the conclusion of the underlying litigation for contractual benefits. The underlying action against the insurer must be resolved in favor of the insured, because the insured cannot allege bad faith if it is not shown that the insurer should have paid the claim.

In order to bring a bad faith claim under the statute, a plaintiff must first give the insurer 60 days' written notice of the alleged violation.[21] The insurer has 60 days after the required notice is filed to pay the damages or correct the circumstances giving rise to the violation.[22] Because first-party claims are only statutory, that cause of action does not exist until the 60-day cure period provided in the statute expires without payment by the insurer.[23] However, because third-party claims exist both in statute and at common law, the insurer cannot guarantee avoidance of a bad faith claim by curing within the statutory period.[24]

"Acting Fairly" to Settle Third-Party Claims

In interpreting what it means for an insurer to act fairly toward its insured, Florida courts have held that when the insured's liability is clear and an excess judgment is likely due to the extent of the resulting

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[11] *Id*.
[12] *Supra* at note 6.
[13] *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 265 (Fla. 5th DCA 1987).
[14] *See Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So. 2d 12 (Fla. 3d DCA 1991).
[15] *See Thompson v. Commercial Union Ins. Co.* 250 So. 2d 259 (Fla. 1971)(recognizing a direct third-party claim under the common law before the enactment of s. 624.155, F.S.); *State Farm Fire and Cas. Co. v. Zebrowski*, 706 So. 2d 275 (Fla. 1997).
[16] s. 624.155(1)(b), F.S.
[17] Fla. Standard Jury Instr. 404.4 (Civil).
[18] s. 624.155(8), F.S.
[19] *Id.*
[20] *Id.*
[21] s. 624.155(3)(a), F.S.
[22] s. 624.155(3)(d), F.S.
[23] *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.,* 753 So. 2d 1278, 1284 (Fla. 2000).
[24] *Macola v. Gov. Employees Ins. Co.*, 953 So.2d 451, 458 (Fla. 2007) (holding that an insurer's tender of the policy limits to an insured in response to the filing of a civil remedy notice, after the initiation of a lawsuit against the insured but before entry of an excess judgment, does not preclude a common law cause of action against the insurer for third-party bad faith).

damage, the insurer has an affirmative duty to initiate settlement negotiations.[25] If a settlement is not reached, the insurer has the burden of showing that there was no realistic possibility of settlement within policy limits.[26] Failure to settle on its own does not mean that an insurer acts in bad faith. Whether an insurer acted in bad faith is determined by the totality of the circumstances:

> In Florida, the question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the totality of the circumstances standard. Each case is determined on its own facts and ordinarily the question of failure to act in good faith with due regard for the interests of the insured is for the jury.[27]

In light of the heightened duty on the part of the insurer as a fiduciary, Florida courts focus on the actions of the insurer during the time when it was acting under a duty to the insured, not the claimant.[28]

"Bad Faith Set Up"

Practitioners advocating for statutory guidelines to determine "bad faith" have pointed out that the court's focus on the actions of the insurer can be exploited to create bad faith claims where they otherwise would not exist.[29] This practice is commonly referred to as the "bad faith set-up," and the various tactics used to set up bad faith claims have been well-documented by courts and commentators.[30] The bad faith set up is an attempt to induce the insurer to commit a tort in order to expand the policy limits. The end goal is to collect an award in excess of the actual policy limits paid by the insured, even in those instances when the insurer is seeking to settle while taking steps it believes are appropriate to protect the insured in any such settlement or has failed in some technical and immaterial way to comply in all respects with a settlement demand.[31]

One tactic for setting up a bad faith claim is to make a settlement offer that likely cannot be complied with by the insurer.[32] Knowing the settlement demands may not be met, the insured/claimant waits for the insurer's misstep, then asserts a bad faith claim. Sometimes the insured/claimant will make an offer for settlement containing an arbitrary and unrealistic deadline for acceptance, before the insurer has had the opportunity to fully investigate the claim. When the insurer is unwilling to agree immediately to the insured's/claimant's demands, a bad faith claim is filed.[33]

For example, in *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601 (Fla. 4th DCA. 1975), plaintiffs made an offer to settle their claim stemming from an automobile accident for the $10,000 policy limit, attaching a 10-day deadline for the defense to accept the offer. Defense counsel, believing that settlement for the policy limits was possible, but not yet authorized to approve the settlement, contacted the plaintiffs' counsel on the last day of the deadline and asked for an extension of the offer until the following Monday after the Friday deadline.[34] The plaintiffs refused and initiated a common law bad faith action for the excess judgment. The Fourth District Court of Appeal affirmed a judgment in the

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[25] *See Powell v. Prudential Property and Casualty Insurance Company*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991).
[26] *Id*.
[27] *See Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 680 (Fla. 2004).
[28] *Id.* at 677.
[29] *See, e.g., Berges*, 896 So. 2d at 685-86 (Wells, J., dissenting).
[30] *See, e.g.,* Janis Brustares Keyser, *Settlement for the Policy Limits: It's Tougher Than It Used To Be*, 23 No. 3 Trial Advoc. Q. 8 (2004); Stephen R. Schmidt, *The Bad Faith Setup*, 29 Tort & Ins. L.J. 705 (1994); *Berges*, 896 So. 2d at 683 (Fla. 2005) (Wells, J., and Cantero, J., dissenting); *Peraza v. Robles*, 983 So. 2d 1189, 1192 (Fla. 3d D.C.A. 2008) (Cope, J., dissenting) ("at the original oral argument, plaintiff's counsel was fairly direct in saying that this entire controversy stems from a desire to set the stage for a 'bad faith' action against the insurer"); *Parich v. State Farm Mut. Auto. Ins. Co.,* 919 F.2d 906, 912 (5th Cir. 1990) (noting that courts have recognized an insurer's defense of set-up "where unrealistic offers are presented through 'carefully ambiguous demands coupled with sudden-death timetables'") (quoting *Baton v. Transamerica Ins. Co.,* 584 F.2d 907, 914 (9th Cir. 1978))
[31] Gwynne A. Young and Johanna W. Clark, *The Good Faith, Bad Faith, and Ugly Set-up of Insurance Claims Settlement*, 85 Fla. Bar. J. 2, p.8 (February 2011).
[32] For a more in-depth discussion, *see* Schmidt, *The Bad Faith Setup*, 29 Tort & Ins. L.J. 705 (1994), and Brustares Keyser, *Settlement for the Policy Limits: It's Tougher Than It Used To Be*, 23 No. 3 Trial Advoc. Q. 8 (2004).
[33] *See, e.g., Berges*, 896 So. 2d at 685-693 (Wells, J., and Cantero, J., dissenting).
[34] *DeLaune*, 314 So. 2d at 601.

insurer's favor finding that the time limitations of the offer were "totally unreasonable under the circumstances. In view of the short space of time between the accident and the institution of suit, the provision of the offer limiting acceptance to ten days made it virtually impossible to make an intelligent acceptance."[35] Although in this particular circumstance the court found that 10 days was not enough, it is not clear exactly what time period or other conditions for acceptance would be permissible, because courts look at the facts on a case-by-case basis and the current statute is silent on this point.

However, despite the lack of clear guidance within the law, the case illustrates that unreasonable time demands have been considered by the court in determining whether an insurer has acted in bad faith. The conduct of the claimant is not entirely ignored, because it is relevant to whether there was a realistic opportunity for settlement. [36] Decisions have consistently addressed the likelihood that intransigence or a failure to cooperate by a claimant in settlement negotiations will fatally undermine a bad faith claim, for example:

- Refusing to meet with insurance company regarding settlement;[37]
- Failing to provide medical information to the insurer regarding the extent of the claimant's injuries;[38] or
- Failing to respond to insurer's attempts to settle claims within the policy limits.[39]

Berges v. Infinity Insurance Co.

Although a claim of bad faith based upon an unreasonable condition or timeframe may ultimately be denied, in the wake of *Berges v. Infinity Insurance Co.,*[40] the determination is argued to be one for the jury rather than court thereby precluding the possibility of summary judgment for the insurer, regardless of the merits of the claim. *Berges* is commonly regarded as a watershed Florida Supreme Court case that set the standard that is currently followed for insurer conduct in bad faith cases under the common law, and it has been widely cited by advocates for revision of the law as marking the end of the possibility of summary judgment in favor of the insurer.[41]

In *Berges*, the claimant delivered a demand letter to the insurer for the $20,000 total policy limits as compensation for the death of his wife and injury to his daughter in a car accident on the condition that the amount be paid within 25 days. The offer was never shared with the insured. The insurer accepted the offer verbally within the deadline, but the written acceptance did not reach the claimant until after the deadline due to a mailing error, and the offer was revoked. Further, there was disagreement as to whether the claimant's offer was valid as a matter of law because he had not yet obtained authority to consummate the settlement. The subsequent trial for wrongful death and personal injury resulted in a jury verdict beyond the policy limits and was followed by a successful bad faith claim filed by the insured against his insurer.

In addressing whether the jury finding of bad faith was supported by competent substantial evidence, the Court upheld the bad faith verdict and reiterated that "[i]n Florida, the question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the totality of the circumstances standard"[42] and that "[e]ach case is determined on its own facts and ordinarily '[t]he question of failure to act in good faith with due regard for the interests of the insured is for the jury.'"[43]

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[35] *Id.* at 603.
[36] *Barry v. GEICO Gen. Ins. Co.*, 938 So.2d 613, 618 (Fla. 4th DCA 2006).
[37] *Id.*
[38] *Aboy v. State Farm Mut. Auto. Ins. Co*., 394 Fed. Appx. 655 (11th Cir. 2010).
[39] *See Cardenas v. Geico Cas. Co.*, 760 F.Supp.2d 1305 (M.D. Fla. 2011); *Boateng v. Geico Gen. Ins. Co.*, 2010 WL 4822601 (S.D. Fla. Nov. 22, 2010) (unpublished); *see also Contreras v. U.S. Sec. Ins. Co.,* 927 So. 2d 16 (Fla. 4th DCA 2006) (where claimant would only agree to release one of two insureds in return for payment of policy limits, no bad faith as a matter of law in insurer's failure to accept that offer).
[40] *Berges v. Infinity Ins. Co.*, 896 So. 2d 665 (Fla. 2004).
[41] The Florida Senate Committee on Judiciary, *Interim Report 2012-132: Insurance Bad Faith* (November 2011), *available at* http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-132ju.pdf.
[42] *Berges*, 896 So. 2d at 680.
[43] *Id.*

The dissent expressed the opinion that the Court "has the responsibility to reserve bad faith damages, which is limitless, court-created insurance, to egregious circumstances of delay and bad faith acts" and "not allow…claims that are the product of sophisticated legal strategies and not the product of actual bad faith." The problem in presuming that bad faith is inherently a jury question, as expressed in the dissent, is that:

> What the jury knows in these cases is that there is a tragically and grievously injured victim, that the insured had very low limits of insurance, and that if the jury finds against the insurer, then all of the victim's damages will be paid by the insurer. It is these very facts which are not allowed to be known by a jury in liability cases because of the known prejudicial influence these facts are known to have on jury verdicts.[44]

Proponents for revision of Florida's bad faith law have stated that since the decision in *Berges v. Infinity Insurance Co*., no state court has granted summary judgment in favor of an insurance company in a bad faith case based on an unreasonable condition or timeframe.[45]

In 2011, the Third District Court of Appeal concluded an opinion in a bad faith case by stating:

> "[U]ntil there is a substantial change in the statutory scheme or the rationale explained in the majority opinion in *Berges*, however, juries will continue to render verdicts regarding an insurer's alleged bad faith when the pertinent facts are in dispute."[46]

Effect of the Bill

The bill amends s. 624.155, F.S., to require that as a condition precedent to bringing a third-party statutory or common-law bad faith action for failure to settle a liability insurance claim, the insured, the claimant, or anyone on behalf of the insured or the claimant must provide the insurer a written notice of loss. The bill does not change the requirements for first-party bad faith claims.

The insurer will not violate the duty to attempt in good faith to settle the claim and will not be liable for bad faith failure to settle if:

- The insurer complies with a request to provide a disclosure statement of insurance policies owned by the insured; and
- Within 45 days after receipt of the written notice of loss, offers to pay the claimant the lesser of the limits of liability coverage applicable to the claimant's insurance claim or the amount that the claimant is willing to accept in exchange for a full release of the insured from any liability arising from the incident reported in the written notice loss.

Currently, post *Berges,* bad faith is determined based on the totality of the circumstances, usually by a jury. This bill effectively makes a determination of bad faith a question of law.

B. SECTION DIRECTORY:

Section 1 amends s. 624.155, F.S., regarding a civil remedy.

Section 2 reenacts s. 766.1185(3), F.S., regarding bad faith actions, to incorporate the amendment made to s. 624.155, F.S.

Section 3 provides an effective date of July 1, 2015.

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[44] *Berges*, 896 So. 2d at 686 n12 (Wells, J., dissenting) (citing s. 627.4136, F.S.; *Van Bibber v. Hartford Accident & Indem. Ins. Co.,* 439 So. 2d 880 (Fla.1983); *State Farm Fire & Cas. Co. v. Nail,* 516 So. 2d 1022 (Fla. 5th DCA 1987)).
[45] *Supra* note at 41.
[46] *United Auto. Ins. Co. v. Estate of Levine ex rel. Howard,* 87 So. 3d 782, 788 (Fla. 3d DCA 2011).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 24, 2015, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment reenacts a section of the Florida Statutes to incorporate changes made by the bill. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.